

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BETTY JEAN DUKES,	)	
	)	CASE NO. C12-0509-RSL-MAT
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
MICHAEL J. ASTRUE, Commissioner of	)	
Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Betty Jean Dukes appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Commissioner’s decision is REVERSED and REMANDED for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1957 and was 50 years old on the alleged disability onset date. (Administrative Record (“AR”) 127.) She has a high school education and previously worked as a sales clerk and medical records clerk. (AR 24, 188.) Plaintiff applied for DIB on March

01 20, 2008, alleging disability beginning July 7, 2007, due to a back impairment. (AR 61, 62,  
02 127-30, 163.)

03 The Commissioner denied plaintiff's claim initially and on reconsideration. (AR  
04 66-68, 70-71.) Plaintiff requested a hearing, which took place on February 8, 2010. (AR  
05 21-56.) On May 19, 2010, the ALJ issued a decision finding plaintiff not disabled. (AR  
06 7-14.) The Appeals Council denied plaintiff's request for review (AR 1-3), and she filed a  
07 complaint in the United States District Court for the Western District of Washington. On June  
08 7, 2011, the Court reversed the ALJ's decision and remanded the case for further administrative  
09 proceedings. (AR 794.)

10 On December 8, 2011, the ALJ held another hearing. (AR 698-773.) On January 23,  
11 2012, the ALJ issued a decision finding plaintiff not disabled. (AR 641-53.) The Appeals  
12 Council denied plaintiff's request for review, making the ALJ's ruling the "final decision" of  
13 the Commissioner as that term is defined by 42 U.S.C. § 405(g). On March 26, 2012, plaintiff  
14 timely filed the present action challenging the Commissioner's decision. (Dkt. No. 1.)

## 15 II. JURISDICTION

16 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
17 405(g) and 1383(c)(3).

## 18 III. DISCUSSION

19 The Commissioner follows a five-step sequential evaluation process for determining  
20 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
21 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had  
22 not engaged in substantial gainful activity since the alleged onset date. (AR 643.) At step

01 two, it must be determined whether the claimant suffers from a severe impairment. The ALJ  
02 found plaintiff's degenerative disc disease and obesity severe. *Id.* Step three asks whether the  
03 claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's  
04 impairments did not meet or equal the criteria of a listed impairment. (AR 645.) If the  
05 claimant's impairments do not meet or equal a listing, the Commissioner must assess residual  
06 functional capacity ("RFC") and determine at step four whether the claimant has demonstrated  
07 an inability to perform past relevant work. The ALJ found plaintiff able to perform light work,  
08 except she is able to stand and/or walk four hours per day for one hour at a time, sit six hours per  
09 day for one hour at a time with the ability to arise from a seated position for a few minutes.  
10 (AR 646.) She can occasionally bend, stoop, crouch, and operate foot pedals, but she can  
11 never kneel, crawl, or balance. In addition, plaintiff must avoid unprotected heights; climbing  
12 ladders, scaffolds, and ropes; and exposure to vibrations and extreme cold. With that  
13 assessment, the ALJ found plaintiff capable of performing past relevant work as a medical  
14 receptionist. (AR 651.)

15 If the claimant is able to perform her past relevant work, she is not disabled; if the  
16 opposite is true, then the burden shifts to the Commissioner at step five to show that the  
17 claimant can perform other work that exists in significant numbers in the national economy,  
18 taking into consideration the claimant's RFC, age, education, and work experience. In the  
19 alternative, the ALJ found, based on the testimony of the vocational expert, there were jobs that  
20 existed in significant numbers in the national economy that plaintiff could perform, such as  
21 office helper, storage rental clerk, and telephone solicitor. (AR 653.) The ALJ concluded  
22 plaintiff has not been under a disability from July 7, 2007, through the date of the decision. *Id.*

01 This Court's review of the ALJ's decision is limited to whether the decision is in  
02 accordance with the law and the findings supported by substantial evidence in the record as a  
03 whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
04 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
05 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747,  
06 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the  
07 ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954  
08 (9th Cir. 2002).

09 Plaintiff argues that the ALJ erred in identifying her back impairment as degenerative  
10 disc disease but not facet arthropathy, evaluating the medical opinion evidence, and in finding  
11 she previously worked as a medical receptionist. (Dkt. 11 at 4.) Plaintiff requests remand for  
12 further administrative proceedings. *Id.* at 21. The Commissioner argues that the ALJ's  
13 decision is supported by substantial evidence and should be affirmed. (Dkt. 12.)

14 A. Medical Opinion Evidence

15 Plaintiff argues the ALJ erred in evaluating the opinions of her treating physicians.  
16 (Dkt. 11.) In general, more weight should be given to the opinion of a treating physician than  
17 to a non-treating physician, and more weight to the opinion of an examining physician than to a  
18 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where not  
19 contradicted by another physician, a treating or examining physician's opinion may be rejected  
20 only for "clear and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391,  
21 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may  
22 not be rejected without "specific and legitimate reasons" supported by substantial evidence in

01 the record for so doing.” *Id.* (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).  
02 The ALJ may reject physicians’ opinions “by setting out a detailed and thorough summary of  
03 the facts and conflicting clinical evidence, stating his interpretation thereof, and making  
04 findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). Rather than merely stating  
05 his conclusions, the ALJ “must set forth his own interpretations and explain why they, rather  
06 than the doctors’, are correct.” *Id.*

07 “The opinion of a nonexamining physician cannot by itself constitute substantial  
08 evidence that justifies the rejection of the opinion of either an examining physician or a treating  
09 physician.” *Lester*, 81 F.3d at 831 (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir.  
10 1990); *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984)). However, “the report of a  
11 nonexamining, nontreating physician need not be discounted when it ‘is not contradicted by *all*  
12 *other evidence* in the record.’” *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir.1995) (quoting  
13 *Magallanes*, 881 F.2d at 752).

14 1. Mitchel D. Storey, D.O.

15 Dr. Storey began treating plaintiff in November 2007 after she injured her back lifting  
16 clothes from a bent position while working at a Macy’s department store. (AR 487-88.) Dr.  
17 Storey found plaintiff had lumbar disc syndrome superimposed on chronic low back pain, and  
18 right sciatic discomfort with no specific neurologic deficit. (AR 488.) He concluded that the  
19 “[p]rimary goal is to be able to increase her activity and return to work; estimated time is six to  
20 eight weeks, probably with limitations. Long term goals may take three to six months.” (AR  
21 488.) The ALJ cited this initial treatment note and gave it “some weight,” finding it was “an  
22 accurate representation of the cited medical findings,” and was consistent with the opinion of

01 the medical expert at the hearing. (AR 651.) Aside from this initial treatment note, the ALJ  
02 did not address Dr. Storey's subsequent notes or opinions. (AR 651.)

03 In April 2008, Dr. Storey diagnosed chronic facetogenic low-back pain following  
04 lumbar spraining injury and opined "she is clearly not ready to go back to work." (AR  
05 476-77.) In May 2008, he noted that due to facet arthropathy she would not be able to work as  
06 a cashier without the ability to sit when necessary. (AR 474.) In June 2008, Dr. Storey agreed  
07 that she had some nonphysiologic findings, but stated that she would be "destined to failure  
08 should she be thrown out into the workforce because her pain has now consumed her." (AR  
09 472.) In August 2008, Dr. Storey noted "[h]er limitations at this point of sitting, standing, and  
10 walking tolerances with her chronic pain are certainly not conducive to employment." (AR  
11 626.) In September 2008, Dr. Storey opined plaintiff continued to have residuals of lumbar  
12 straining injury with facet arthropathy and, although she was improving with physical therapy,  
13 she should continue to remain off work. (AR 976.)

14 Because Dr. Storey opined that plaintiff's impairments significantly interfered with her  
15 ability to perform basic work activities, the ALJ was required to explain why this probative  
16 evidence was rejected or not discussed. *See Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir.  
17 1984). The record clearly establishes the ALJ failed to give any reasons to reject Dr. Storey's  
18 opinions regarding plaintiff's impairments. The ALJ erred in failing to do so.

19 The Commissioner concedes the ALJ failed to discuss Dr. Storey's opinions, but  
20 contends that the error was harmless. (Dkt. 12 at 11.) Where the ALJ errs by failing to  
21 provide any reasons for rejecting the relevant evidence, the error is harmless only if the Court  
22 "can confidently conclude that no reasonable ALJ, when not making the same error as the ALJ

01 could have reached a different disability determination.” *Stout v. Comm’r, Soc. Sec. Admin.*,  
02 454 F.3d 1050, 1055-56 (9th Cir. 2006) (recognizing application of harmless error in Social  
03 Security context where a “mistake was nonprejudicial to the claimant or irrelevant to the ALJ’s  
04 ultimate disability conclusion.”). The Commissioner asserts that any omission would not  
05 affect the ALJ’s decision because Dr. Storey’s opinions covered only a seven month period,  
06 appeared to be based on plaintiff’s self-reports, and were cumulative of the opinions the ALJ  
07 permissibly rejected. As the ALJ did not mention these reasons in rejecting Dr. Storey’s  
08 opinions, the Commissioner’s argument is an improper post-hoc rationalization this Court  
09 cannot rely on to affirm the ALJ. *See Pinto v. Massanari*, 249 F.3d 840, 847–48 (9th Cir.  
10 2001). Because the ALJ did not make legally sufficient findings to reject Dr. Storey’s  
11 opinions, the Court cannot say “no reasonable ALJ, when fully crediting the testimony, could  
12 have reached a different disability determination.” *Stout*, 454 F.3d at 1055. Hence, the  
13 Commissioner’s suggestion that the ALJ’s failure to consider Dr. Storey’s opinions was  
14 harmless fails. On remand, the ALJ must reassess Dr. Storey’s opinions.

15       2. Jeffrey Fitzthum, M.D.

16       On March 10, 2008, Dr. Fitzthum performed a consultation report on referral from Dr.  
17 Storey. (AR 417-19, 489-91.) He noted that a lumbar MRI from September 30, 2007,  
18 showed “surprisingly healthy” lumbar disks – except for a mild and broad-based disk bulge,  
19 moderate right foraminal narrowing, and moderate facet arthropathy at L5-S1; and mild facet  
20 arthropathy at L4-L5. (AR 417, 489.) He also noted that a February 2008 SPECT bone scan  
21 showed multi-level facet joint arthropathy, most notably at L5-S1 and L4-L5. *Id.* In addition,  
22 a lumbar CT scan from 2005 showed moderate-severe facet arthropathy at L5-S1 and mild facet

01 arthropathy at L4-L5. *Id.* On examination, he found plaintiff's gait was guarded with short  
02 steps, she had reduced range of motion, she was tight and tender on palpitation, and straight leg  
03 raises provoked right sided back pain. (AR 418-19, 490-91.) Dr. Fitzthum opined "the  
04 location of pain and the findings of lumbar CT, MRI, and SPECT indicate that back pain is  
05 predominantly facetogenic; there is also evidence on MRI and physical examination for  
06 possible right L5 radiculopathy." (AR 419, 491.) Based on his findings, Dr. Fitzthum opined  
07 plaintiff was "unable to return to work at this point." *Id.*

08 The ALJ rejected this opinion, stating as follows:

09 The Administrative Law Judge also considered the May 2008 opinion expressed by  
10 Dr. Fitzthum that the claimant was unable to return to work "at this point." [AR  
11 491.] However, the listed functional capacity limitations were all estimates by the  
12 claimant. [AR 490.] Furthermore, this opinion does not indicate any belief that  
the claimant was unable to work for any 12 continuous months, based on her  
impairments.

13 AR 650. The Court agrees with plaintiff these are not specific and legitimate reasons for  
14 rejecting Dr. Fitzthum's opinion.

15 "An ALJ may reject a treating physician's opinion if it is based 'to a large extent' on a  
16 claimant's self-reports that have been properly discounted as incredible." *Tomassetti v.*  
17 *Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting *Morgan v. Comm'r Soc. Sec. Admin.*, 169  
18 F.3d 595, 602 (9th Cir. 1999)). There is no indication in this record, however, that Dr.  
19 Fitzthum's opinion that plaintiff was unable to return to work was based on plaintiff's own  
20 estimate of her functional capacity rather than on the objective medical evidence and his clinical  
21 findings. Indeed, as plaintiff points out, this Court previously found that Dr. Fitzthum  
22 "considered objective medical evidence in rendering his opinions and did not rely entirely on

01 Ms. Duke's subjective complaints." (AR 800.) Thus, this is not a specific and legitimate  
02 reason to reject Dr. Fitzthum's opinion.

03 The ALJ also discounted Dr. Fitzthum's opinion because he did not specifically indicate  
04 that plaintiff was unable to work for 12 continuous months. (AR 650.) However, as plaintiff  
05 points out, Dr. Fitzthum did not specifically indicate that plaintiff was able to work or would  
06 improve within 12 months either. While it may be relevant to whether plaintiff's disability is  
07 for a closed period, it is not probative of Dr. Fitzthum's opinion regarding plaintiff's  
08 impairments and limitations. The fact that Dr. Fitzthum did not expressly indicate plaintiff  
09 would be unable to work for 12 consecutive months is not a specific and legitimate reason to  
10 reject his opinion that plaintiff was "unable to return to work at this point."

11 3. C. William Korbonits, M.D.

12 On March 21, 2009, Dr. Korbonits examined plaintiff and completed a Department of  
13 Social and Health Services ("DSHS") physical evaluation in which he opined that plaintiff was  
14 limited to sedentary work. (AR 542-46, 559-72.) The ALJ gave Dr. Korbonits' opinion  
15 "some weight," stating as follows:

16 His completion of this form, however, only noted such minimal pain with shoulder  
17 shrug and tender left lumbar muscles. The assessments of improvement appear to  
18 have their foundation merely in what the claimant told the doctor. In fact, the  
19 assessment by Dr. Korbonits indicated that the limitations would only last some 6  
months, suggesting that the duration requirement of 12 continuous months are not  
satisfied. Furthermore, this assessment is missing one page, which undercuts its  
value.

20 (AR 650.) The ALJ rejected this opinion because his only findings were that she had minimal  
21 pain with shoulder shrug and tender left lumbar muscles. (AR 542, 650.) However, the  
22 record shows Dr. Korbonits also found plaintiff had slow gait due to pain (AR 542), muscle

01 weakness (AR 542, 562), overweight at 207 pounds (AR 542, 563), a bone scan showing facet  
02 degeneration in the lumbar spine (AR 542, 562), moderate limitations in her ability to sit, stand,  
03 walk, lift, handle, and carry (AR 543), and reduced range of motion with extension and flexion  
04 (AR 545-46). The ALJ failed to explain how these findings are insufficient to support Dr.  
05 Korbonits opinion.

06 The ALJ also rejected Dr. Korbonits' opinion because he estimated her limitations  
07 would last 6 months and, as such, did not establish disability for a continuous period of 12  
08 months. (AR 650.) The ALJ's rationale is based on the 12-month durational requirement set  
09 forth in 42 U.S.C. § 423(d)(1)(A). Under that section, the term "disability" means "the  
10 inability to engage in any substantial gainful activity by reason of any medically determinable  
11 physical or mental impairment which can be expected to result in death or which has lasted or  
12 which can be expected to last for a continuous period of not less than 12 months." However, as  
13 plaintiff points out, Dr. Korbonits's opinion in March 2009 was more than a year after the  
14 alleged onset date and was preceded and followed by opinions of treating physicians consistent  
15 with or more limiting than his opinion. (AR 474, 482, 488, 491, 551, 601, 636, 977, 976.)  
16 Thus, the ALJ's rejection of Dr. Korbonits's opinion based upon the durational requirement of  
17 § 423(d)(1)(A) is not supported by substantial evidence.

18 Finally, the ALJ rejected Dr. Korbonits's opinion because page one of the DSHS  
19 evaluation was missing. (AR 650.) Plaintiff correctly argues that the ALJ erred. Even  
20 without the missing page, the ALJ should have been able to conduct a proper evaluation of the  
21 evidence as the first page only contains the plaintiff's chief complaints and symptoms. (*See*  
22 AR 634, 948.) To the extent the evidence was ambiguous or inadequate, the ALJ had a duty to

01 develop the record to resolve the ambiguity. “Ambiguous evidence, or the ALJ’s own finding  
02 that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ’s  
03 duty to ‘conduct an appropriate inquiry.’” *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th  
04 Cir. 2001) (citation omitted). Accordingly, the ALJ erred in rejecting Dr. Korbonsits’s opinion.

05 4. Steven Dresang, M.D.

06 Plaintiff began seeing Dr. Dresang in June 2009. (AR 600-01.) On June 2, 2009, he  
07 noted that “[c]urrently she is unable to work.” (AR 601.) On June 18, 2009, Dr. Dresang  
08 wrote a letter in which he opined that plaintiff “has osteoarthritis of the spine that has caused her  
09 to be unable to work since May of 2007. She continues to have daily symptoms and is unable  
10 to lift over 10 lbs or stand for prolonged periods of time.” (AR 551.) The ALJ rejected Dr.  
11 Dresang’s letter stating, “With no reference to objective medical findings, these statements are  
12 unsupported.” (AR 650.)

13 Plaintiff argues that the ALJ erred in failing to address Dr. Dresang’s June 2, 2009,  
14 finding that plaintiff was unable to work. (Dkt. 11 at 14.) However, Dr. Dresang’s June 2,  
15 2009, finding that plaintiff was unable to work is necessarily encompassed in his June 18, 2009,  
16 letter two weeks later in which he opined that plaintiff has been unable to work since May 2007.  
17 (*Compare* AR 601 and AR 551.) As the June 2 statement is cumulative of the June 18 letter  
18 which the ALJ addressed, the ALJ did not err in failing to also address the June 2 finding.

19 On September 17, 2009, Dr. Dresang completed a DSHS physical evaluation in which  
20 he opined plaintiff was limited to sedentary work, and could not lift over 10 pounds, push over  
21 25 pounds, bend, stoop, and must be able to change positions “ad lib.” (AR 636.) The ALJ  
22 rejected this opinion stating, “Again no objective medical findings were cited in support of such

01 conclusions as the claimant being incapable of lifting over 10 pounds.” (AR 650-51.)

02       An ALJ may reject a treating physician’s opinion that is conclusory and unsupported.  
03 *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *see also Thomas*,  
04 278 F.3d at 957 (“The ALJ need not accept the opinion of any physician, including a treating  
05 physician, if that opinion is brief, conclusory, and inadequately supported by clinical  
06 findings.”). Here, however, the ALJ’s determination that Dr. Dresang’s findings are not  
07 supported is at odds with the undisputed fact that plaintiff has osteoarthritis as shown through  
08 an MRI, SPECT scan, and CT scan. (AR 581, 583, 592, 600.) It is also contrary to the other  
09 medical evidence in the record. As this Court previously found, “The DSHS evaluation  
10 contains the doctor’s notes showing he performed a clinical examination and that based on that  
11 examination reached the opinion Ms. Dukes was limited to sedentary work. [AR 636-37.]  
12 Moreover, Dr. Dresang’s separate treatment notes contain additional information which  
13 flesh-out his opinion about Ms. Duke’s impairments, at least as to her ability to stand, walk, and  
14 sit. [AR 590-602.]” (AR 802.) For example, in June 2009, Dr. Dresang noted that she  
15 walked with a limp. (AR 600.) In July 2009, Dr. Dresang saw plaintiff after she was seen in  
16 the emergency room for low back pain and found she was tender on examination. (AR 592.)  
17 In September 2009, Dr. Dresang noted she had osteoarthritis and limited range of motion in her  
18 spine. (AR 635-36.) Therefore, clinical findings support Dr. Dresang’s opinions.

19       This Court previously acknowledged that Dr. Dresang’s treatment records do not  
20 indicate plaintiff is incapable of lifting over 10 pounds, and hence it was correct for the ALJ to  
21 reject that portion of the doctor’s opinion regarding lifting and pushing limitations. (AR  
22 802-03.) Nevertheless, the ALJ erred, as discussed above, in rejecting Dr. Dresang’s June 18,

2009, letter and September 17, 2009, DSHS opinion regarding plaintiff's standing, walking, bending, and stooping ability, and her need to change positions, as unsupported by objective medical findings.

5. Kathy Thomas, M.D.

On August 2, 2010, Dr. Thomas opined in a DSHS evaluation that plaintiff's osteoarthritis and myofascial pain syndrome caused marked to severe limitations. (AR 950.) She opined plaintiff could lift no more than 10 pounds and would be limited to sedentary work, meaning the ability to lift 10 pounds maximum and frequently lift and/or carry small items such as files and tools. *Id.* She estimated plaintiff's limitations would last at least twelve months. (AR 951.)

The ALJ rejected this evaluation stating that "[t]he alleged limitation to lifting no more than 10 pounds is unaccompanied by any explanation through the use of objective medical findings." (AR 651.) The Court finds the record supports the ALJ's conclusion that Dr. Thomas's treatment records do not reflect the lifting limitations set forth in the evaluation. An ALJ is not required to accept a medical opinion that is inadequately supported by medical findings. *See Batson*, 359 F.3d at 1195 (holding that an ALJ may discount treating physicians' opinions that are brief, conclusory, or unsupported by the record as a whole or by objective medical findings); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992) (holding an ALJ may discount the conclusory opinion of an examining or treating physician if the opinion is unsupported by clinical findings). The ALJ did not err in his treatment of Dr. Thomas's opinion.

On August 19, 2011, Dr. Thomas completed a DSHS form in which she

01 checked-marked boxes indicating that plaintiff could not sit, stand, or walk for brief or  
02 prolonged periods, or lift any weight. (AR 937.) She indicated this condition was expected to  
03 impair plaintiff's work function permanently. *Id.* The ALJ rejected Dr. Thomas's opinion  
04 finding that "[t]his assessment occurred at a time in which the claimant was 'scheduled for  
05 surgery or in the process of getting approval for surgery' which explains the extreme  
06 restrictions. There is no evidence cited by Dr. Thomas to indicate that this level of restriction  
07 lasted for any extended period of time." (AR 651.) Plaintiff did not challenge this finding.

08 On August 22, 2011, three days later, Dr. Thomas wrote in treatment notes, "doubt pt  
09 will be able to return to work unless very part time and sedentary." (AR 944.) The ALJ did  
10 not address Dr. Thomas's opinion. The Commissioner argues any error the ALJ committed is  
11 harmless because this opinion was cumulative of her August 19, 2011 form opinion (AR 937)  
12 and, therefore, plaintiff cannot show prejudice. Dkt. 12 at 11.

13 As noted above, the ALJ specifically rejected a similar opinion prepared just three days  
14 earlier. If evidence is cumulative of other evidence specifically addressed, the ALJ is not  
15 required to address and discount the cumulative evidence. *See Magallanes*, 881 F.3d at 755  
16 Here, Dr. Thomas's treatment note was cumulative of her form opinion, thus, any error in  
17 failing to give specific and legitimate reasons for rejecting it was harmless. Accordingly,  
18 plaintiff's claim does not warrant reversal or remand.

19 B. Step Two Finding

20 Plaintiff argues, and the Court agrees, the ALJ erred at step two in failing to find her  
21 facet arthropathy a severe impairment at step two. (Dkt. 11 at 4.) At step two, a claimant  
22 must make a threshold showing that her medically determinable impairments significantly limit

01 her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987);  
02 20 C.F.R. §§ 404.1520(c), 416.920(c). “Basic work activities” refers to “the abilities and  
03 aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b), 416.921(b). “An  
04 impairment or combination of impairments can be found ‘not severe’ only if the evidence  
05 establishes a slight abnormality that has ‘no more than a minimal effect on an individual’s  
06 ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social  
07 Security Ruling (“SSR”) 85-28). “[T]he step-two inquiry is a de minimis screening device to  
08 dispose of groundless claims.” *Id.* (citing *Bowen*, 482 U.S. at 153-54).

09       Here, there is objective medical evidence that plaintiff suffers from facet arthropathy.  
10 (AR 644.) As indicated above, Drs. Storey, Fitzhum, Korbonits, and Dresang opined that  
11 plaintiff’s facet arthropathy caused work-related limitations. (AR 542, 551, 636, 976.) While  
12 a claimant has the burden to prove a severe impairment at step two, the ALJ still has a duty to  
13 explain or make factual findings to support her conclusion. The ALJ made no such findings  
14 and instead relied on the opinions of independent medical examiners Paul Reis, M.D., and  
15 William Thieme, M.D., who both opined that plaintiff was able to return to work due to the  
16 absence of any work-related restrictions. (AR 522-36, 649.) However, their opinions were  
17 limited to whether plaintiff’s work-related injury – lumbar strain/sprain – rendered her unable to  
18 work. (AR 530-32, 536.) As this Court previously found, although both doctors noted  
19 plaintiff suffered from facet arthropathy, neither gave opinions about the effects of this  
20 impairment on her ability to work. (AR 799.) Thus, the medical expert’s opinion does not  
21 negate the opinions of plaintiff’s treating physicians’ opinions which encompassed plaintiff’s  
22 degenerative disc disease and her facet arthropathy.

01 The ALJ indicated that she asked the medical expert about plaintiff's facet arthropathy,  
02 however, the record shows that she asked the medical expert to distinguish lumbar strain and  
03 facet generative arthritis. (AR 652, 715.) The ALJ did not ask the medical expert whether  
04 plaintiff's facet arthropathy could reasonably cause the symptoms alleged, or whether the  
05 opinions of the independent medical examiners should be given less weight because they did  
06 not consider the effect of this impairment on her ability to work. Under these circumstances,  
07 the Court concludes the ALJ's failure to consider plaintiff's facet arthropathy and the combined  
08 effect it has with her other impairments on plaintiff's ability to function is not harmless.

09 C. Step Four

10 Plaintiff contends the ALJ erred in determining she had past relevant work as a medical  
11 receptionist because the vocational expert ("VE") testified that it was unclear whether plaintiff  
12 had worked as a medical receptionist or an administrative clerk. (Dkt. 11 at 17.) Plaintiff  
13 asserts this issue is significant because the VE found she could work as a medical receptionist,  
14 but not as an administrative clerk. *Id.* The Commissioner responds that any error in the ALJ's  
15 step four finding was harmless because the ALJ also performed an alternative step five analysis  
16 and found plaintiff could perform other jobs in significant numbers in the national economy.  
17 The Court need not resolve these contentions as the ALJ erred in evaluating the medical  
18 evidence and must necessarily reevaluate on remand what impact, if any, this issue has on  
19 plaintiff's RFC, and steps four and five.

20 D. Remand for further proceedings

21 The Court may remand for an award of benefits where "the record has been fully  
22 developed and further administrative proceedings would serve no useful purpose." *McCartey v.*

01 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). This occurs when: (1) the ALJ has failed to  
02 provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no  
03 outstanding issues that must be resolved before a determination of disability can be made; and  
04 (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he  
05 considered the claimant's evidence. *Id.* at 1076–77.

06 Here, there are outstanding issues that must be resolved. As indicated above, the  
07 opinions of Drs. Storey, Fitzhum, Korbonits, and Dresang must be reassessed, and the effect of  
08 plaintiff's facet arthropathy on her residual functional capacity is unresolved. Therefore,  
09 remand is appropriate in order to allow the Commissioner the opportunity to consider the  
10 medical evidence as a whole and to incorporate the properly considered medical evidence into  
11 the consideration of plaintiff's RFC.

#### 12 IV. CONCLUSION

13 For the foregoing reasons, the Court recommends that the Commissioner's decision be  
14 REVERSED and REMANDED for further administrative proceedings not inconsistent with  
15 this Report and Recommendation. On remand, the ALJ should utilize the five step sequential  
16 evaluation process and (1) further develop the medical evidence as necessary, (2) reassess step  
17 two, (3) reevaluate the opinions of Drs. Storey, Fitzhum, Korbonits, and Dresang, (4) reevaluate  
18 plaintiff's RFC, and (5) reassess steps four and five with the assistance of a vocational expert if  
19 deemed appropriate. A proposed order accompanies this Report and Recommendation.

20 DATED this 12th day of September, 2012.

21   
22 Mary Alice Theiler  
United States Magistrate Judge